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No. 08-73

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CONNIE C. RESHARD,

Petitioner,

v.

LANKENAU HOSPITAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MICHAEL J. GLASSNER, M.D.

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REASONS FOR DENYING THE PETITION

This Court should deny plaintiff's petition because plaintiff has clearly failed to demonstrate that the decisions of the courts below conflict with any decision of this Court or another Court of Appeals, that the Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of proceedings that this Court should exercise its supervisory power, or that the decisions of the courts below involve a federal question that has not been decided by this Court. In fact, as will be shown below, plaintiff's first question presented was squarely addressed by this Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962), and that holding was properly applied to the instant matter by the lower courts. Moreover, plaintiff's remaining questions presented clearly fail to raise important issues that justify the exercise of this Court's supervisory power. Therefore, as plaintiff clearly has failed to meet her burden of establishing that compelling reasons exist for why her petition should be granted, this Court should deny plaintiff's Petition for a Writ of Certiorari.

A. The District Court Did Not Violate Plaintiff's Due Process Rights, the Rules of Civil Procedure, or Any Decision of This Court by Dismissing Plaintiff's Case *Sua Sponte*.

Plaintiff's first argument in support of her petition is difficult to follow as it contains multiple allegations of error that are seemingly unrelated. However, it appears that plaintiff's primary argument is that the district court's *sua sponte* dismissal of her case deprived her of

due process and equal protection under the law. Plaintiff contends that the standards applied by the district courts in the Third Circuit for determining when dismissal for failure to prosecute a case is appropriate vary significantly from the standards applied by district courts in other circuits. Plaintiff seems to suggest that the test applied by the Third Circuit is much more stringent than the test applied by other circuits, particularly since the Third Circuit allows district courts to dismiss a plaintiff's case *sua sponte* and without notice. Plaintiff also maintains that the *sua sponte* dismissal of her case without notice violates this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991). Plaintiff asserts that these alleged errors are so compelling that this Court should exercise its prerogative of granting further appellate review. However, plaintiff's argument is clearly without merit.

1. **This Court has unequivocally held that district courts possess the power to dismiss a cause of action with prejudice *sua sponte* for a plaintiff's failure to diligently prosecute his claims.**

It is well-settled that federal trial courts possess the authority to dismiss a cause of action with prejudice *sua sponte* if a plaintiff fails to timely prosecute his claims. *Link v. Wabash R.R.*, 370 U.S. 626, 82 S. Ct. 1386, 1388 (1962). "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Id.* "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by

rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 1389. *Accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 2132 (1991).

Moreover, this Court has explicitly held that that the failure of district courts to give notice of the possibility of dismissal or the failure to hold an adversarial hearing does not necessarily violate a litigant's constitutional right to due process. *Link*, 82 S. Ct. at 1389-90. In *Link*, this Court acknowledged that the fundamental requirement of due process is that litigants be granted an opportunity to be heard upon such notice and proceedings as are sufficient to ensure the right for which the constitutional protection is invoked. *Id.* at 1389 (*citing Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599, 606 (1944)). However, this Court then observed that "this does not mean that every order entered without notice and a preliminary adversary hearing offends due process." *Link*, 82 S. Ct. at 1389. This Court then explained that "[t]he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Id.* at 1389-90. Moreover, this Court noted that the availability of a corrective remedy, such as the remedy provided by Federal Rule of Civil Procedure 60(b), renders the lack of prior notice of less consequ nce. *Id.* at 1390. Accordingly, this Court expressly held that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute

even without affording notice of its intention to do so or providing an adversary hearing before acting." *Id.*

In the instant matter, plaintiff contends that the test applied by the Court of Appeals for the Third Circuit for determining when dismissal for failure to prosecute a case is appropriate varies significantly from the tests applied in other circuits. Plaintiff argues that other courts of appeals require district courts to give advance notice before dismissing a case for failure to prosecute. Plaintiff then asserts that the Third Circuit does not require prior notice in such cases and that the disparate treatment of plaintiffs among the circuits constitutes unequal treatment under the law. Plaintiff argues that this unequal treatment is unconstitutional.

However, even assuming, *arguendo*, that other circuits require district courts to give prior notice to litigants before dismissing a case for failure to prosecute, this does not render the test applied in the Third Circuit unconstitutional. Indeed, all that our Constitution guarantees is that litigants receive the minimum requirements of due process. The fact that some circuits may provide litigants with additional protections does not mean that the Third Circuit's failure to provide those same protections is unconstitutional. Rather, pursuant to this Court's holding in *Link*, it certainly does not offend a litigant's constitutional right to due process to dismiss a plaintiff's cause of action without notice and a hearing. *Id.* at 1389-90. Thus, it is irrelevant whether other circuits may require district courts to provide such notice.

Furthermore, contrary to plaintiff's contention, this Court's holding in *Chambers* did nothing to alter the rule set forth in *Link*. Citing language from Justice Kennedy's dissent in *Chambers* out of context, plaintiff argues that the majority's holding in *Chambers* modified the ability of a lower court to *sua sponte* dismiss a plaintiff's case for failure to prosecute without providing the plaintiff prior notice. *See* plaintiff's petition, pp. 17-18. However, this clearly is not true. In fact, the issue before this Court in *Chambers* did not even concern the sanction of dismissal.

Rather, the issue this Court addressed in *Chambers* was whether a "District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys." *Chambers*, 111 S. Ct. at 2128. In *Chambers*, this Court was concerned with whether the existence of other sanctioning schemes, such as the sanctions available under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11, displaced the inherent power of courts to impose attorneys' fees as a sanction for a litigant's bad faith conduct. *Id.* at 2134-36. In holding that these sanctioning mechanisms did not eliminate the inherent power of district courts to impose sanctions beyond what the other sanctioning mechanisms allowed, this Court cited *Link* merely for the proposition that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 111 S. Ct. at 2135. Specifically, this Court observed that "[i]n, *Link*, it was recognized that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the

language of Federal Rule of Civil Procedure 41(b) appeared to require a motion from a party." *Chambers*, 111 S. Ct. at 2135.

Although Justice Kennedy's dissent in *Chambers* disagreed with the majority's reading of *Link*, neither Justice Kennedy nor the majority opinion in *Chambers* ever suggested that the majority intended to modify this Court's holding in *Link* by requiring that district courts provide notice before dismissing a case for failure to prosecute. Rather, Justice Kennedy merely disagreed with the majority's apparent suggestion that *Link*'s holding contravened a prior version of Federal Rule of Civil Procedure 41(b), which appeared to require a motion from a party before a case could be dismissed for failure to prosecute. *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting). Specifically, Justice Kennedy stated that "contrary to the Court's characterization, the holding in *Link* turned on a determination that Rule 41(b) contained ***permissive*** language . . . which merely authorizes a motion by the defendant." *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting) (emphasis in the original) (*citing Link*, 82 S. Ct. at 1388). Thus, while the majority opinion in *Chambers* interpreted *Link* as recognizing that district courts retain their inherent powers to sanction parties even when those powers might contravene the Federal Rules of Civil Procedure, Justice Kennedy concluded that *Link*'s holding did not contravene the Federal Rules of Civil Procedure because Rule 41(b) was not meant to abrogate the inherent powers of district courts and to provide the only means by which a case could be dismissed for a plaintiff's failure to prosecute. Hence, there simply is nothing in *Chambers* to suggest that this Court intended

to modify its holding in *Link* that district courts possess the inherent power to *sua sponte* dismiss a plaintiff's action for failure to prosecute without prior notice and a hearing. Accordingly, plaintiff's contention that the district court did not possess the power to *sua sponte* dismiss her cause of action without prior notice is clearly without merit.

2. The District Court acted well within the permissible range of its discretion in dismissing plaintiff's cause of action.

In *Link v. Wabash R.R.*, 370 U.S. 626, 82 S. Ct. 1386 (1962), this Court concluded that, whether an order *sua sponte* dismissing a plaintiff's case for failure to prosecute without affording the plaintiff notice or a hearing can stand on appeal "depends not on power but on whether it was within the permissible range of the court's discretion." *Id.* at 1390. This Court noted that, where the circumstances show that a party had knowledge of the consequences of his conduct, a district court does not abuse its discretion in sanctioning the party without advance notice and a hearing. *Id.*

In the instant matter, the district court clearly did not abuse its discretion in dismissing plaintiff's case without providing notice of its intent to do so. Indeed, after commencing this action in April, 2002, plaintiff did next to nothing to establish that she had a meritorious cause of action or to otherwise move this case forward. To the contrary, by filing frivolous motions and appeals and blatantly disregarding the district court's rules and orders, plaintiff succeeded only in delaying the ultimate resolution of this case. Although plaintiff's antagonistic

and insolent conduct towards the district court, alone, would suffice to support the court's dismissal of plaintiff's claims, an analysis of the factors outlined by the Court of Appeals for the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), in the context of this case clearly supports the district court's decision.

In *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit outlined the following six (6) factors that district courts should consider when determining whether a plaintiff's failure to timely prosecute his claim or to obey court orders constitutes proper grounds for dismissal of his action:

> (1) the extent of the ***party's*** personal ***responsibility***;
>
> (2) the ***prejudice*** to the adversary caused by the failure to meet scheduling orders and respond to discovery;
>
> (3) a ***history*** of dilatoriness;
>
> (4) whether the conduct of the party or the attorney was ***willful*** or in ***bad faith***;
>
> (5) the effectiveness of sanctions other than dismissal, which entails an analysis of ***alternative sanctions***; and
>
> (6) the ***meritoriousness*** of the claim or defense.

Id. at 868 (emphasis in the original). However, "[t]he *Poulis* standard is not a 'mechanical calculation' for

deciding whether or not to dismiss a plaintiff's complaint, and 'not all of the *Poulis* factors need be satisfied in order to dismiss a complaint.'" *Smith v. Altegra Credit Co.*, 2004 U.S. Dist. LEXIS 21478, at *12 (E.D. Pa. September 23, 2004) (*quoting Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992)). Rather, the *Poulis* factors should be considered in the context of the district court's prolonged contact with the litigant to determine whether dismissal of a plaintiff's action is appropriate. *Mindek*, 964 F.2d at 1373. Moreover, when a litigant's conduct makes it impossible to adjudicate a case, it is unnecessary for a court to utilize the *Poulis* balancing test. *Sebrell v. Philadelphia Police Dep't*, 159 Fed. Appx. 371, 374 (3d Cir. 2005). "Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court." *Mindek*, 964 F.2d at 1373.

In the instant matter, from the inception of this case until the date it was dismissed, plaintiff exhibited an inexcusable history of dilatoriness and repeated violations the district court's rules and orders. For instance, although it was her obligation to move this case forward, plaintiff never produced any expert reports and took only one deposition during the entire four (4) year period that this case was before the district court. She also thwarted defendants attempts to conduct discovery by failing to participate in her Court-ordered deposition. In fact, other than taking a single deposition on March 20, 2003, the only action that plaintiff took with respect to this case was to file several frivolous motions with the district court and to file three (3) separate appeals to the United States Court of Appeals for the Third Circuit from various non-appealable orders.

Moreover, although plaintiff claimed that she needed to review the medical records from Lankenau Hospital to prepare her case, she failed to appear at a scheduled appointment to view the hospital chart without informing defense counsel that she would not show, in violation of the district court's November 26, 2003, discovery order. Plaintiff never explained to defense counsel or the court why she failed to appear at this appointment, nor did she request that the appointment be re-scheduled for another date.

Furthermore, at a conference before the district court on November 26, 2003, Judge Surrick specifically ordered plaintiff to produce a written report within seventy-five (75) days from a qualified medical professional stating that, after reviewing the Lankenau Hospital medical chart, there existed a reasonable probability that defendants breached applicable standards of medical care in treating plaintiff and that such alleged negligence was a proximate cause of plaintiff's purported injuries. *See* plaintiff's Petition for a Writ of Certiorari, App., p.14. Judge Surrick expressly warned plaintiff that her failure to comply with this Order would "result in the imposition of severe sanctions." *See id.* Nevertheless, plaintiff deliberately disregarded the court's Order and failed to provide any legitimate excuse for doing so. In fact, not only did plaintiff fail to produce the foregoing statement from a medical expert within seventy-five (75) days of the court's Order, but she also failed to produce the statement at any time thereafter.

In addition, on February 20, 2004, plaintiff failed to appear at a scheduled status conference before the

district court despite having nearly three (3) months of advanced notice of the conference date. Rather than contact the court to explain her absence or to request that the conference be rescheduled, plaintiff simply ignored the court and defense counsel in blatant disregard of the district court's authority. In fact, after failing to attend that conference, the only action which plaintiff took with respect to this case over the next twenty-six (26) months was to file her third appeal to the United States Court of Appeals for the Third Circuit from a non-appealable order. Certainly, plaintiff's conduct exemplifies a history of dilatoriness and failure to respect court orders that should not be tolerated. Thus, the third factor of the *Poulis* test certainly supports the district court's order of dismissal.

Moreover, as plaintiff is representing herself in this litigation, she clearly bears personal responsibility for her conduct in this matter. This certainly is not a case where the plaintiff's attorney is responsible for delaying litigation and violating court orders, while the plaintiff, herself, is innocent of any wrongdoing. To the contrary, as plaintiff is representing herself in this matter, she alone is responsible for the failure to move this case forward and her failure to respect the lower court's orders. Plaintiff is also not entitled to the leniency that federal courts typically grant to *pro se* litigants with respect to adhering to the technicalities of the Federal Rules of Civil Procedure since she, herself, is a practicing attorney and member of the Pennsylvania Bar. Furthermore, in any event, it is well-settled that all litigants, including *pro se*, have a duty to comply with court orders and must suffer the consequences of any failure to fulfill that duty. *Burns v. Glick*, 158 F.R.D.

354, 356 (E.D. Pa. 1994) (*citing McDonald v. Head Criminal Court Supervising Officer*, 850 F.2d 121, 124 (2d Cir. 1988)). Therefore, the first factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

Furthermore, the plaintiff's failure to comply with the district court's orders or to move this case forward has certainly caused defendants to suffer substantial prejudice. Federal courts have held that the prejudice prong of the *Poulis* test "does not require a showing of 'irremediable harm' to the opposing party." *Smith*, 2004 U.S. Dist. LEXIS 21478, at *15. "Rather, the imposition of a burden that impedes a party's ability to prepare effectively for trial is sufficient." *Id.* (*citing Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223 (3d Cir. 2003)). Moreover, "'prejudice to defendants resulting from unreasonable delay may be presumed.'" *Shannon v. General Elec. Co.*, 186 F.3d 186, 195 (2d Cir. 1999) (*quoting Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1996)). Instantly, plaintiff's failure to attend scheduled conferences, to testify at her deposition, or to comply with discovery orders, has severely prejudiced defendants by hampering their ability to effectively prepare a defense strategy and to move this case toward trial. *Cf. Ware*, 322 F.3d at 222; *Smith*, 2004 U.S. Dist. LEXIS 21478, at *16-17. Indeed, as the alleged negligence at issue in this case took place more than eight (8) years ago, plaintiff's prolonged delay certainly has resulted in the loss of evidence which supports defendants' case and the inability of defense witnesses to accurately recollect the events at issue. Moreover, plaintiff's conduct has further prejudiced defendants by causing them and their insurers to

unnecessarily expend significant time and money defending against an action that is completely devoid of merit. *See Smith*, 2004 U.S. Dist. LEXIS 21478, at *18 ("Prejudice to an opposing party includes unnecessary financial burdens imposed because of Plaintiff's misconduct.") (*citing Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 874 (3d Cir. 1994)). Therefore, the second factor of the *Poulis* test certainly supports the district court's order of dismissal.

In addition, plaintiff's failure to attend the court's scheduling conference, to participate in her deposition, or to abide by the lower court's discovery orders must be deemed to have been willful and in bad faith. Indeed, plaintiff does not deny that she understood these court directives, nor that she had adequate time to comply with them. Nevertheless, she blatantly failed to obey the lower court's orders or to move this case forward without providing any legitimate excuse for her conduct. Under the circumstances, it must be presumed that plaintiff's misconduct was done willfully and in bad faith. Thus, the fourth factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

Moreover, as the district court noted in its Opinion, alternative sanctions would not have been viable or effective in this case. Indeed, while her action was pending before the lower court, plaintiff showed a complete disdain for the district court's authority by repeatedly ignoring court orders, failing to appear at conferences and depositions, filing frivolous appeals and motions, and failing to conduct any substantive discovery. In fact, as the district court noted, for more

than two (2) years before her action was dismissed, plaintiff failed to take any action at all to move this matter towards trial. Hence, plaintiff would certainly have ignored any alternative sanctions imposed by the district court. Therefore, the fifth factor of the *Poulis* test certainly supports the district court's order of dismissal.

Finally, after more than four (4) years of litigation plaintiff clearly failed to establish that her cause of action had even the slightest hint of merit. In fact, when directed by the district court to produce an affidavit of merit by a licensed medical professional which supported her medical negligence claims against defendants, plaintiff completely ignored the court's order. Plaintiff had over four (4) years to conduct discovery and produce expert reports which supported her cause of action, yet she failed to produce even a scintilla of evidence or a one paragraph expert report to support her claims. Thus, the sixth factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

In light of the above, it is clear that a consideration of the *Poulis* factors in the context of this case more than supports the district court's order of dismissal. Moreover, contrary to plaintiff's contention, the district court sufficiently notified plaintiff of the possibility that her case could be dismissed by admonishing her that her failure to comply with the court's November 26, 2003, order would "result in the imposition of severe sanctions." *See* plaintiff's Petition for a Writ of Certiorari, App., p.14. Thus, the district court clearly did not abuse its discretion by dismissing plaintiff's cause of action.

B. The District Court Did Not Apply a Different Standard to Plaintiff as an Attorney *Pro Se* Litigant Than the Court Would Apply to a Lay *Pro Se* Litigant.

Plaintiff's next argument is that the district court erred by failing to apply the same standards to an attorney *pro se* litigant that are generally applied to lay *pro se* litigants during the course of the litigation. Specifically, plaintiff maintains that the district court erred by denying her certain privileges customarily granted to *pro se* litigants because of her status as an attorney. Therefore, plaintiff contends that this Court should review this matter to determine if she was denied equal protection under the law. However, plaintiff's argument is clearly without merit.

Indeed, contrary to plaintiff's contention, the district court never treated her differently than other *pro se* litigants merely because of her status as an attorney. Notably, the only example that plaintiff cites of this purportedly disparate treatment was the district court's directive that any attorney representing plaintiff must be a member of the district court's bar. This directive was certainly proper.

Indeed, it is well-settled that attorneys must be admitted to the bar of any court in which they intend to give legal counsel to a client. In the United States District Court for the Eastern District of Pennsylvania, attorneys are permitted to represent clients in civil proceedings provided they meet the requirements of Local Rule of Civil Procedure 83.5. These requirements are not difficult to satisfy, but they are clearly mandatory. *See* E.D. of Pa. R. Civ. P. 83.5.

In the instant matter, plaintiff contends that the district court erred by denying her the right to have legal counsel of her choice represent her at her discovery deposition. However, this clearly is not true. Indeed, to the contrary, the district court merely required that any attorney purporting to represent plaintiff in this matter be admitted to the district court before offering her legal counsel. This requirement was neither difficult for plaintiff to satisfy, nor did it prejudice her in any way. In fact, the requirement was actually made in plaintiff's best interests to ensure that anyone intending to give her legal advice concerning this case be a qualified attorney in good standing in the legal community. Notably, plaintiff has not addressed the district court's actual ruling in her appellate brief, nor has she given any explanation as to how the district court's ruling prejudiced her case. Therefore, this allegation or error is clearly without merit and does not constitute a compelling reason for this Court to review this matter.

C. The District Court Did Not Err in Denying Plaintiff's Motion for the Entry of a Default Judgment Against Defendants.

Plaintiff's final argument is that the district court erred by denying plaintiff's motion to strike defendants' answers to plaintiff's complaint and to enter a default judgment in plaintiff's favor. Specifically, plaintiff contends that district court abused its discretion by failing to enter a default judgment against defendants after defendants filed various responses to plaintiff's Amended Complaint in August, 2002. Plaintiff asserts that she filed and served her initial pleadings in late July, 2002, and, therefore, defendants were a few days

late in filing their responses with the court. Plaintiff maintains that defendants' delay in filing responses to her initial pleadings warranted the entry of a default judgment in plaintiff's favor. However, plaintiff's argument is clearly without merit.

It is of course well-settled that federal courts generally disfavor the entry of default judgments and desire that litigants resolve their disputes by reaching a decision on the merits. *Gross v. Stereo Component Sys.*, 700 F.2d 120, 122 (3d Cir. 1983) *(citing Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982)). *See also Tecmarine Lines, Inc. v. CSX Intermodal, Inc.*, 2001 U.S. Dist. LEXIS 12398, at *3 (E.D. Pa. August 13, 2001). To determine whether a default judgment should be granted, district courts should consider the following three (3) factors:

> (1) [the] prejudice to the plaintiff if default is denied,
>
> (2) whether the defendant appears to have a litigable defense, and
>
> (3) whether defendant's delay is due to culpable conduct.

Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000). The district court's refusal to enter a default judgment should only be overturned if the lower court abused its discretion. *Id.*

In the instant matter, as a preliminary matter, Dr. Glassner certainly was not late in filing a response to plaintiff's Amended Complaint. Indeed, plaintiff filed her

initial pleadings on April 2, 2002, but apparently did not attempt to serve her Complaint on defendants. She then filed an Amended Complaint on July 22, 2002, and served defendants with copies over the next two (2) days. However, before defendants were required to file responses to plaintiff's Amended Complaint, plaintiff filed a Second Amended Complaint on August 12, 2002. Dr. Glassner then filed a Motion to Dismiss plaintiff's pleadings, pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f), on August 29, 2002. After the district court denied Dr. Glassner's motion on October 18, 2002, Dr. Glassner timely filed an Answer with Affirmative Defenses to plaintiff's Second Amended Complaint on October 29, 2002. Thus, contrary to plaintiff's argument, Dr. Glassner clearly filed his response to plaintiff's pleadings in a timely fashion.

Moreover, in any event, plaintiff certainly has not established that the district court abused its discretion by failing to enter a default judgment against any defendant. Indeed, plaintiff has not even alleged, much less established through any sort of evidence, that the district court's denial of her motion for a default judgment caused her to suffer any prejudice. In fact, it is difficult to fathom what sort of prejudice plaintiff could have suffered when all defendants had filed responses to plaintiff's pleadings by the beginning of December, 2002. It is especially evident that plaintiff did not suffer any prejudice by the denial of her request for the entry of default judgments given that she failed to take any action to move this case forward over the next three (3) and a half years after she filed her Second Amended Complaint. "Prejudice to the plaintiff occurs when relief would hinder the plaintiff's ability to pursue

its claims through loss of evidence, increased potential for fraud, or substantial reliance on the default." *Tecmarine Lines, Inc.*, 2001 U.S. Dist. LEXIS 12398, at *6. As set forth in section A above, any hindrance in plaintiff's ability to pursue her claims was due to plaintiff's own conduct, or lack thereof. Thus, the district court's ruling certainly did not cause plaintiff any prejudice.

Furthermore, plaintiff has also not denied that defendants presented a meritorious defense to each of her negligence claims. To satisfy this prong of the test, a "defendant need not establish the merit of its defense; rather, he must only offer a defense which, if successful at trial, would completely bar the action." *Id.* at *3-4. Instantly, Dr. Glassner did just that by responding to plaintiff's allegations of negligence with multiple affirmative defenses and by asserting that his medical treatment of plaintiff did not breach applicable standards of medical care. As plaintiff has not offered any evidence, or even argument, to suggest that defendants did not have a meritorious defense to plaintiff's claims, this prong of the default judgment test certainly favors the district court's ruling.

Finally, plaintiff has not presented any evidence or argument to suggest that any delay in defendants' filing of responses to her pleadings was caused by any culpable conduct. "A defendant exhibits culpable conduct if he fails to respond to the complaint willfully, in bad faith, or as part of trial strategy." *Id.* at *7 (*citing International Bhd. of Elec. Workers, Local Union 313 v. Skaggs*, 130 F.R.D. 526, 529 (D. Del. 1990)). Instantly, it is difficult to conceive of how defendants could have

gained any tactical advantage over plaintiff by filing their answers to her pleadings when they did. In fact, plaintiff does not even claim that defendants gained any such advantage. Moreover, plaintiff has not produced any evidence which even remotely suggests that defendants willfully delayed in responding to her pleadings or did so in bad faith. Therefore, this prong of the default judgment test certainly supports the district court's denial of plaintiff's motion.

In light of the above, it is clear that the district court did not abuse its broad discretion in denying plaintiff's motion for the entry of a default judgment against defendants. Therefore, plaintiff's final allegation of error is clearly without merit and does not constitute a compelling reason for this Court to review this matter.

CONCLUSION

Plaintiff clearly has failed to meet her burden of establishing that compelling reasons exist for why her Petition for a Writ of Certiorari should be granted. Consequently, for all of the foregoing reasons, respondent/defendant, Michael J. Glassner, M.D., respectfully requests that this Honorable Court deny plaintiff's Petition for a Writ of Certiorari.

Respectfully submitted,

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